RECORD AND BRIEFS

15-1031

No. ____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

JOHN HOWELL,
Petitioner,

v.

SANDRA HOWELL,
Respondent.

On Petition for a Writ of Certiorari
to the Arizona Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Uniformed Services Former Spouses' Protection Act preempts a state court's order directing a veteran to indemnify a former spouse for a reduction in the former spouse's portion of the veteran's military retirement pay, where that reduction results from the veteran's post-divorce waiver of retirement pay in order to receive compensation for a service-connected disability.

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PETITION FOR WRIT OF CERTIORARI

John Howell petitions for a writ of certiorari to review the judgment of the Arizona Supreme Court.

OPINIONS BELOW

The decision of the Arizona Supreme Court (Pet. App. 1a) is reported at 361 P.3d 936. The decision of the Arizona Court of Appeals (Pet. App. 15a) is unreported but is available at 2014 WL 7236856. The decision of the Arizona Superior Court (Pet. App. 23a) is unreported.

JURISDICTION

The judgment of the Arizona Supreme Court was entered on December 2, 2015. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTES INVOLVED

The Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, tit. X, 96 Stat. 730 (1982), is codified at 10 U.S.C. § 1408. 10 U.S.C. § 1408(c)(1) provides:

> Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

10 U.S.C. § 1408(a)(4) provides, in pertinent part:

> The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which–
>
> . . .
>
> (B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-marital or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;
>
> . . .

38 U.S.C. § 5304(a)(1) provides, in pertinent part:

> Except . . . to the extent that retirement pay is waived under other provisions of law, not more than one award of pension, compensation, emergency officers', regular, or reserve retirement pay . . . shall be made concurrently to any person based on such person's own service . . . .

38 U.S.C. § 5305 provides, in pertinent part:

> . . . [A]ny person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, . . . and who would be eligible to receive pension or compensation under the laws administered by the Secretary [of Veterans Affairs] if such person were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such

retired or retirement pay is paid of a waiver of so much of such person's retired or retirement pay as is equal in amount to such pension or compensation.

STATEMENT OF THE CASE

This case concerns the proper treatment in divorce of a veteran's military retirement pay when the veteran also suffers from a service-connected disability. In many cases, disabled veterans are eligible for disability pay or retirement pay, but not both; thus, when a veteran elects to take disability pay, he must waive a portion of his retirement pay. As this Court has previously held, the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408, permits the division of retirement pay, but prohibits the division of disability pay, in divorce proceedings. *Mansell v. Mansell*, 490 U.S. 581 (1989).

In the decision below, Petitioner's disability arose *after* a divorce judgment had already divided his military retirement pay between Petitioner and Respondent, his former spouse. After Petitioner elected to take disability pay and waived a portion of his military retirement pay, the divorce court issued an order requiring Petitioner to indemnify Respondent for the reduction in her share of Petitioner's military retirement pay that resulted from his post-divorce election of disability compensation. The Arizona Supreme Court upheld the divorce court's order, finding that the modification of the decree did not conflict with the USFSPA. Four other state supreme courts have adopted the same interpretation of the USFSPA, but five have squarely rejected it, holding that such orders are preempted by the USFSPA. That entrenched and well-recognized division of authority with respect to a recurring question of federal law warrants this Court's review.

A. Statutory Framework

The Federal Government provides a pension for members of the Armed Forces who retire after serving for a minimum period (generally twenty years). *Mansell*, 490 U.S. at 583; *see, e.g.*, 10 U.S.C. § 8911(a) (Air Force). This pension is known as Military Retirement Pay ("MRP"). In addition, veterans who suffer from service-connected disabilities are entitled to compensation. *See* 38 U.S.C. §§ 1110, 1131. The amount of compensation for a given disability is based on a scale that reflects "the average impairments of earning capacity resulting from such injuries in civil occupations." *Id.* § 1155.

In order to receive disability compensation, veterans who are entitled to MRP generally must waive an equivalent portion of their MRP. *See* 38 U.S.C. §§ 5304(a)(1), 5305.[1] Veterans in that position often elect to receive disability compensation because, unlike MRP, disability compensation is exempt from federal, state, and local taxation. *See Mansell*, 490 U.S. at 583-84.

In *McCarty v. McCarty*, 453 U.S. 210 (1981), this Court held that federal law did not permit states to treat MRP as divisible property in divorce proceedings. As the Court explained, Congress conferred MRP as a "personal entitlement" of service members, and state

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[1] A veteran whose disability is rated as at least 50 percent disabling is permitted to receive overlapping disability compensation and MRP. 10 U.S.C. § 1414(a). Because Petitioner is 20 percent disabled, that provision does not apply in this case. Pet. App. 3a.

courts were therefore barred from awarding an interest in a veteran's MRP to a former spouse in a divorce. *Id.* at 232. The Court noted that Congress was free to afford greater protection to former spouses if it so chose. *Id.* at 235-36.

Congress responded by passing the Uniformed Services Former Spouses' Protection Act (USFSPA), Pub. L. No. 97-252, tit. X, 96 Stat. 730 (1982) (codified at 10 U.S.C. § 1408). The USFSPA overrode *McCarty* in part: it authorized state courts to treat MRP as divisible property, but it excluded from this authority, inter alia, any portion of MRP that is waived in order to obtain disability compensation. Specifically, as relevant here, the Act provides that "a court may treat *disposable retired pay* payable to a member . . . either as property solely of the member or as property of the member and his spouse," 10 U.S.C. § 1408(c)(1) (emphasis added), and it defines "disposable retired pay" to exclude "amounts which . . . are deducted from the retired pay of such member . . . as a result of a waiver of retired pay required by law in order to receive [disability] compensation," *id.* § 1408(a)(4).

In *Mansell v. Mansell*, this Court confirmed that the USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." 490 U.S. at 594-95. Mr. Mansell was a military retiree who had waived a portion of his MRP in favor of disability compensation. When Mr. Mansell and Mrs. Mansell divorced, they entered into a property settlement that obligated Mr. Mansell to pay Mrs. Mansell "50 percent of his total

military retirement pay, including that portion of retirement pay waived so that [Mr.] Mansell could receive disability benefits." *Id.* at 586. Mr. Mansell later petitioned the state courts to modify the divorce decree to remove this provision, but they refused to do so. This Court reversed. As the Court explained, the USFSPA did not disturb the prior federal rule of non-divisibility with respect to the portion of MRP that a military retiree waives in favor of disability compensation. *Id.* at 592-94.

B. Proceedings Below

Petitioner John Howell and Respondent Sandra Howell divorced in 1991. The dissolution decree issued by the Arizona Superior Court provides that "[Respondent] is entitled to and is awarded as her sole and separate property FIFTY PERCENT (50%) of [Petitioner]'s military retirement when it begins through a direct pay order." Pet. App. 41a.[2] Petitioner retired from the Air Force in 1992 after a twenty-year career, and the parties began receiving MRP shortly thereafter. *Id.* at 2a-3a.

In 2005, the Department of Veterans Affairs (VA) determined that Petitioner suffers from degenerative joint disease in his shoulder and that this impairment qualifies as a service-connected disability. The VA estimated that Petitioner's disability reduces his earning capacity by twenty percent. *Id.* at 3a; *see* 38

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[2] A "direct pay order" authorizes the Federal Government to make payments directly to a former spouse who has been awarded a portion of a veteran's MRP. *See* 10 U.S.C. § 1408(d); *Mansell*, 490 U.S. at 585.

U.S.C. § 1155 (explaining disability-rating system). Accordingly, he qualifies for monthly payments of tax-exempt disability compensation to replace his lost earnings. Pet. App. 3a. In order to obtain this compensation, Petitioner was required to waive an equal portion of his MRP. *See* 38 U.S.C. § 5304(a)(1). He therefore executed such a waiver, effective from July 2004. Pet. App. 3a. As a consequence, the MRP payments to both Petitioner and Respondent declined.

In 2013, Respondent brought an action to "enforce" the provision of the divorce decree regarding MRP, arguing that it entitled her to half of the full value of the MRP for which Petitioner is eligible (notwithstanding any waiver on his part). *Id.* at 3a-4a. The Arizona Superior Court agreed and ordered Petitioner to "ensur[e] [Respondent] receive[s] her full 50% of the military retirement without regard for the disability." *Id.* at 28a. The Arizona Court of Appeals affirmed. *Id.* at 21a.

In the Arizona Supreme Court, Petitioner argued that the USFSPA, as construed in *Mansell*, denies state courts the authority to award a former spouse an interest in the waived portion of a veteran's MRP. *Id.* at 5a.[3] The Supreme Court acknowledged that *Mansell* barred state courts from "dividing MRP that has been waived to receive federal disability benefits." *Id.* at 6a (citing *Mansell*, 490 U.S. at 589). But, the court

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[3] Although Petitioner had not raised this argument in the Superior Court, the Supreme Court exercised its discretion to decide the federal question on the merits, explaining that the issue was "of public importance" and "likely to recur." Pet. App. 5a.

explained, this case presents the distinct question "how the family court should proceed when a veteran elects a VA waiver to receive disability benefits *after* entry of a dissolution decree, thereby reducing the ex-spouse's share of previously awarded MRP." *Id.* The court noted that "[c]ourts in other jurisdictions have divided on the issue." *Id.* It concluded that although "the family court cannot divide MRP that has been waived to obtain disability benefits at the time of the decree or thereafter," the court was free to order Petitioner to *indemnify* Respondent for the reduction in her share of MRP. *Id.* at 7a. As the court explained:

> The 2014 Order did not divide the MRP subject to the VA waiver, order [Petitioner] to rescind the waiver, or direct him to pay any amount to [Respondent] from his disability pay. Under these circumstances, the family court did not violate the USFSPA or *Mansell* because it did not treat the MRP subject to the VA waiver as divisible property. . . . Nothing in the USFSPA directly prohibits a state court from ordering a veteran who makes a post-decree VA waiver to reimburse the ex-spouse for reducing his or her share of MRP.

Id. at 7a-8a. The Arizona Supreme Court thus concluded that, because the family court had not awarded Respondent an interest in the disability compensation itself, but rather an equal sum to be satisfied by any of Petitioner's assets, *Mansell* and the USFSPA did not apply.

The court also rejected Petitioner's alternative arguments under state law. Pet. App. 8a-14a. The

court acknowledged that "[b]ecause the decree did not require John to indemnify Sandra for her loss of MRP, the 2014 Order necessarily modified the original property disposition terms." *Id.* at 10a. But it rejected Petitioner's argument that an Arizona statute barred such modifications, holding that the statute violated the Arizona Constitution. *Id.* at 11a-14a.

REASONS FOR GRANTING THE WRIT

I. The State Courts Are Squarely Divided On The Question Presented.

As the Arizona Supreme Court acknowledged below, and as many other courts have also noted, the question presented has sharply divided the state courts. In Maine, Tennessee, Massachusetts, Rhode Island, and now Arizona, a state court may require a veteran to indemnify a former spouse for the reduction in MRP brought about by a post-divorce disability waiver. In Vermont, Mississippi, Alabama, Alaska, and Nebraska, federal law is understood to prohibit such an order. These decisions are in direct conflict regarding the meaning of the USFSPA and of this Court's decision in *Mansell*. This Court should grant review to resolve that entrenched conflict regarding a recurring question of federal law.

A. The Supreme Courts Of Maine, Tennessee, Massachusetts, And Rhode Island, As Well As Arizona, Interpret The USFSPA To Permit Indemnification Orders.

In the decision below, the Arizona Supreme Court held that the USFSPA permits a family court to order a veteran to indemnify a former spouse for the reduction in MRP that results from the veteran's choice to receive disability compensation. Four other state supreme courts have reached the identical conclusion.

1. In *Black v. Black*, 842 A.2d 1280 (Me. 2004), the Supreme Judicial Court of Maine interpreted the USFSPA in the same manner as the decision below.

When David and Lorraine Black divorced in 1993, the divorce judgment provided that each would receive "fifty per cent (50%) of [David's] disposable [military] retirement pay." *Id.* at 1282. Seven years later, the VA increased David's disability rating, and David waived his retirement pay in order to obtain the increased disability compensation available to him. *Id.* In response, Lorraine moved to enforce the original judgment, or, alternatively, to modify it to vindicate her claim to compensation based on the amount of MRP that David had previously received.

The Supreme Judicial Court noted that "[s]ince *Mansell*, jurisdictions have divided on the question of whether the USFSPA limits the authority of state courts to grant relief when, as here, a postjudgment conversion of retirement pay to disability pay divests the share of retirement pay allocated to a former spouse in an earlier divorce judgment." *Id.* at 1284. The court reasoned that *Mansell* had only "explicitly addressed" the treatment "*upon* divorce" of MRP that had already, at the time of the divorce, been waived in favor of disability compensation. *Id.* at 1284-85 (emphasis in original; internal quotation marks omitted). It therefore concluded, in accord with the decision below, that "the USFSPA does not limit the authority of a state court to grant postjudgment relief when military retirement pay previously divided by a divorce judgment is converted to disability pay, so long as the relief awarded does not itself attempt to divide disability pay as marital property." *Id.* at 1285. The family court was therefore free to enter an "order that results in David paying to Lorraine some or all of the

amount she would have received directly from the United States Government absent David's conversion of his retirement pay to disability pay." *Id.*

2. The Supreme Court of Tennessee has reached the same conclusion on the same facts. *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001). James and Willie Jean Johnson divorced in 1996. *Id.* at 894. At the time, James was an active-duty member of the Marine Corps. The marital dissolution agreement, incorporated into the divorce decree, provided that "[u]pon [James's] retirement, [Willie Jean] shall receive one-half of all military retirement benefits due [James]." *Id.* Both parties began to receive MRP when James retired. Thereafter, James waived a portion of his MRP in order to receive disability compensation, thereby reducing the MRP payments to both parties. *Id.* Willie Jean petitioned for a modification of the divorce decree to increase her payments by an equal amount, which the Supreme Court construed as a motion to enforce the original decree. *Id.* at 895-96.

The Supreme Court instructed the family court to grant Willie Jean's motion. It reasoned that Willie Jean had a "vested right" in the expected value of the MRP at the time of the divorce, which could not be "unilaterally diminished by an act of the military spouse." *Id.* at 897-98. The court held that *Mansell* posed no obstacle to this result because the divorce decree did not "divide Mr. Johnson's disability benefits in violation of *Mansell*." *Id.* at 898. As the court explained, its construction of the divorce decree would not require James to pay Willie Jean from his disability benefits (or from the waived portion of his MRP), but

would rather require him to pay her an amount equal to the MRP she would have received in the absence of his disability-based waiver. *Id.*

3. The Supreme Judicial Court of Massachusetts has confronted the same question and has adopted the same position. *Krapf v. Krapf*, 786 N.E.2d 318 (Mass. 2003). Albert and Constance Krapf divorced in 1985. *Id.* at 319. Under the terms of their separation agreement, which was incorporated in the divorce judgment, Albert committed to to "allocating half his pension rights with the U.S. Army to [Constance]." *Id.* Albert retired from the Army in 1994, and both Albert and Constance began receiving MRP payments. *Id.* at 320. In 1997, the VA determined that Albert suffered from post-traumatic stress disorder, and, in order to obtain disability compensation, he waived the majority of his MRP. *Id.* at 320-21. Constance then filed suit against Albert, arguing that he was obligated to restore her to the position she would have enjoyed in the absence of that waiver. *Id.* at 321.

The Supreme Judicial Court sided with Constance. The court reasoned that Albert had breached the settlement agreement "by converting his and [Constance's] military retirement benefits to VA disability benefits for his own benefit." *Id.* at 324. The court also concluded that *Mansell* and the USFSPA did not preclude an order requiring Albert to pay Constance the amount of MRP she would have received in the absence of a disability waiver. *Id.* at 326. The court acknowledged that *Mansell* "does not permit State courts 'to treat as property divisible upon divorce military retirement pay that has been waived to

receive veterans' disability benefits.'" *Id.* (quoting *Mansell*, 490 U.S. at 595). But it reasoned that "[t]he judgment in this case does not divide the defendant's VA disability benefits in contravention of the *Mansell* decision; the judgment merely enforce[s] the defendant's contractual obligation to his former wife, which he may satisfy from any of his resources." *Id.*

4. The Rhode Island Supreme Court has adopted the same rule as well. *Resare v. Resare*, 908 A.2d 1006 (R.I. 2006). When Ronald and Susan Resare divorced in 1986, the divorce decree incorporated a property settlement agreement, which provided that "[Susan] shall be entitled to receive as a property settlement, a sum equal to thirty-five (35%) percent of the gross pension of [Ronald]." *Id.* at 1007-08 & n.2. Both parties then received MRP payments directly from the government. *Id.* at 1008. In 1997, Ronald began to receive disability compensation from the VA, and the MRP payments to both Ronald an Susan were reduced as a result. *Id.* Susan filed suit to enforce the terms of the decree, which, she argued, entitled her to 35% of the *total* pension Ronald would have received if he had not obtained disability compensation. *Id.*

The Supreme Court accepted that argument. It first interpreted the divorce decree to provide that Susan was entitled to 35% of the MRP for which Ronald would have been eligible in the absence of a disability waiver. *Id.* at 1009-10. It then explained that *Mansell* and the USFSPA did not foreclose this interpretation, or the ensuing order that Ronald pay Constance what she would have received in the absence of disability compensation. Specifically, the court

explained that, "[i]n *Mansell*, the property settlement agreement sought to divide the husband's disability benefits that he was receiving at the time of the divorce," but "[t]hat is not what happened here." *Id.* Rather than "divid[ing] Ronald's disability benefit in contravention of *Mansell*," the order that Constance sought would simply enforce the division of property contemplated by the original agreement, when Ronald was not receiving disability compensation at all. *Id.* at 1010.

The highest courts of Maine, Tennessee, Massachusetts, and Rhode Island, as well as Arizona, are thus in agreement. Each has held that when a veteran waives MRP in favor of disability compensation *after* a divorce, the court may order the veteran to offset the reduction in the former spouse's MRP. Such indemnity orders are not precluded by *Mansell* or the USFSPA, according to this view, because they do not divide *disability benefits* (or, equivalently, the waived portion of MRP), but permit the veteran to satisfy this obligation out of any of his or her assets.

B. The Supreme Courts Of Vermont, Mississippi, Alabama, Alaska, And Nebraska Interpret The USFSPA To Prohibit Indemnification Orders.

Five other state supreme courts have interpreted *Mansell* and the USFSPA to prohibit the same orders that the decisions described above understood them to permit.

1. The Vermont Supreme Court has squarely broken with the decisions recounted above by holding that, under federal law, a state court may *not* require a veteran to indemnify a former spouse for the reduction in MRP effected by a post-divorce disability waiver. *Youngbluth v. Youngbluth*, 6 A.3d 677 (Vt. 2010). Bruce and Elisabeth Youngbluth divorced in 2005, shortly after Bruce retired from the Marine Corps. The divorce decree awarded Elisabeth "19.81% of [Bruce's] monthly retirement benefits." *Id.* at 679. Shortly thereafter, the VA rated Bruce as 30% disabled, and he therefore waived a portion of his MRP, which was "replaced dollar-for-dollar" by disability compensation. *Id.* The MRP payments to both Bruce and Elisabeth decreased accordingly. Elisabeth then petitioned the family court to increase her percentage share of the MRP to cancel out the reduction in its total size, and the court did so. *Id.* at 679-80.

The Vermont Supreme Court reversed, holding that federal law barred the family court from increasing Elisabeth's share of the MRP to compensate for Bruce's disability-based waiver. The court first surveyed the extensive body of case law dealing with this question and concluded that "[s]tate courts are split on this issue," with "no clear majority viewpoint." *Id.* at 684, 687. It then specifically declined to "join[] those courts that have found 'creative solutions' around *Mansell*." *Id.* at 684 (quoting *In re Smith*, 56 Cal. Rptr. 3d 341, 345 (Cal. App. 2007)). Among the decisions that the Vermont Supreme Court rejected as unpersuasive was *In re Marriage of Gaddis*, 957 P.2d 1010 (Ariz. Ct. App. 1997), which the Arizona Supreme Court adopted

in the decision below. *Compare Youngbluth*, 6 A.3d at 686-87 (noting that *Gaddis*, and other out-of-state opinions, "directly support wife in the appeal before this Court"), *with* Pet. App. 6a (adopting *Gaddis*'s reasoning).

In rejecting that line of authority, the Vermont Supreme Court observed that "a decision by the United States Supreme Court on a matter of federal law is binding upon the state courts." *Youngbluth*, 6 A.3d at 685 (internal quotation marks omitted). The court then held that *Mansell* squarely foreclosed the divorce court's order, reasoning that "[b]y raising [Elisabeth's] percentage of [Bruce's] disposable retirement benefits, the trial court was clearly offsetting the effect that [Bruce's] receipt of disability benefits had on the payments due to [Elisabeth]." *Id.* at 688-89. That "represented an attempt to attach funds that federal law does not allow the trial court to distribute as property in a divorce proceeding." *Id.* at 688. The court therefore reversed the family court's order and reinstated the terms of the original decree.[4]

2. The Mississippi Supreme Court has taken the same side of the split. *Mallard v. Burkart*, 95 So. 3d

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[4] Justice Johnson concurred and noted her agreement that the family court's modification to the original decree amounted to "an end-around to the Supreme Court's holding in *Mansell*." *Youngbluth*, 6 A.3d at 692 (Johnson, J., concurring). She wrote separately to emphasize that when a divorce decree is based on fraudulent representations by a veteran regarding his or her plans to seek disability compensation, the court remains free to grant relief from the original decree under the state analogue of Rule 60(b) of the Federal Rules of Civil Procedure. *Id.* at 691-95.

1264 (Miss. 2012). Tonya Burkart and James Mallard divorced in 2001. *Id.* at 1267. At the time, Mallard was an active-duty member of the Air Force. The divorce judgment incorporated a property settlement agreement, which provided that "[Burkart] is awarded 40% of [Mallard's] disposable military retired pay." *Id.* In 2002, Mallard retired and began sending Burkart forty percent of his monthly MRP income. In 2003, the VA determined that Mallard was entitled to disability compensation; he waived a portion of MRP in order to obtain that compensation; and he decreased his monthly payments to Burkart as a result. *Id.* Burkart petitioned for modification of the divorce judgment, asserting "that Mallard had structured his retirement from the Air Force in such a way as to defeat her forty-percent interest in the retirement pay." *Id.* The family court agreed, holding Mallard liable for "the difference between what Burkart would have received had Mallard not gone on disability and what she actually had received." *Id.* at 1268.

On appeal, the Mississippi Supreme Court first noted that "[s]everal other states have addressed whether state trial courts have any authority to distribute disability benefits, where the military spouse goes on disability after the divorce property settlement is finalized," and that "[t]here is a split of authority on this question, and no clear majority view." *Id.* at 1271. Whereas the family court had relied on the Tennessee Supreme Court's analysis in *Johnson*, *see supra* pp. 13-14, the Mississippi Supreme Court adopted the reasoning advanced by the Vermont Supreme Court in *Youngbluth*. *Id.* at 1272. As the court explained,

"[w]hatever the equities may be, state law is preempted by federal law, and thus, state courts are precluded from ordering distribution of military disability benefits contrary to federal law." *Id.* The court found "the holding of *Mansell* to be both specific and clear," and, like the Vermont Supreme Court, declined to follow other state courts that had "established 'creative solutions' around the literal meaning of the *Mansell* holding." *Id.* (quoting *In re Smith*, 56 Cal. Rptr. 3d at 345). The court concluded that the USFSPA, as construed in *Mansell*, has the unavoidable consequence that payments to a former spouse could be reduced "simply because [the military spouse] elects to increase his after-tax income by converting a portion of that pay into disability benefits." *Id.* (quoting *Mansell*, 490 U.S. at 595 (O'Connor, J., dissenting); alteration in original). The court therefore reversed the family court's order holding Mallard liable for "the difference between what Burkart would have received had Mallard not gone on disability and what she actually received." *Id.* at 1273.

3. The Alabama Supreme Court has adopted the same interpretation of federal law in the same circumstances. *Ex parte Billeck*, 777 So. 2d 105 (Ala. 2000). When Edwin and Hellene Billeck divorced in 1989, the divorce judgment incorporated a settlement agreement providing that "[Edwin] agrees to pay to [Hellene] his monthly U.S. Army retirement check." *Id.* at 106. Edwin, who was already retired and receiving MRP at the time of the divorce, began remitting his MRP income to Hellene. In 1998, he waived a portion of his MRP in favor of disability

compensation, and his payments to Hellene accordingly decreased. *Id.* at 107. Hellene then petitioned the family court to order Edwin to pay her both his MRP and his disability income, which together equated to the sum she had received prior to Edwin's waiver. The court entered such an order. *Id.*

The Alabama Supreme Court reversed. As the court explained, *Mansell* "specifically limits the state courts from treating veteran's disability benefits received in lieu of retirement pay as divisible community property." *Id.* at 108. Accordingly, "[w]hen a trial court makes an alimony award based upon its consideration of the amount of veteran's disability benefits, the trial court essentially is awarding the wife a portion of those veteran's disability benefits; and in doing so the trial court is violating federal law." *Id.* at 109. The court therefore ruled that the family court could not order Edwin to remit his disability compensation to Hellene or to pay her an equal sum. *Id.*[5]

4. In *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992), the Alaska Supreme Court took the same position, vacating a family court's order that would have required a veteran to indemnify a former spouse for the reduction in her share of MRP that resulted from his election of disability compensation. Dorothy and James Clauson divorced in 1984. *Id.* at 1259. At that time, James was a military retiree receiving MRP.

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[5] The court specifically rejected contrary decisions of several state appellate courts, including those in Florida, Arkansas, and Vermont. *Billeck*, 777 So. 2d at 108.

The parties entered into a property settlement that entitled Dorothy to "13/40 of [James's] current military pension and increases therein." *Id.* Four years later, in 1990, James waived his MRP in favor of disability compensation. *Id.* Dorothy then filed a motion to modify the divorce decree, and the family court entered an order requiring James to pay Dorothy, on a monthly basis, the sum that she had been receiving in MRP prior to his waiver. *Id.* at 1259-60.

The Alaska Supreme Court vacated that order. It first explained that *Mansell* "unequivocal[ly]" bars state courts from "equitably divid[ing] veterans' disability benefits received in place of waived retirement pay." *Id.* at 1262. It noted that this prohibition does not mean that courts must "completely ignore the economic consequences of a military retiree's decision to waive retirement pay in order to collect disability pay." *Id.* at 1263. Rather, a court may "consider a party's military disability benefits as they affect the financial circumstances of both parties" in determining an equitable overall asset distribution. *Id.* at 1264. But the court noted the "risk" that this limited authorization "might lead trial courts to simply shift an amount of property equivalent to the waived retirement pay from the military spouse's side of the ledger to the other spouse's side," emphasizing that "[t]his is unacceptable." *Id.* Under *Mansell*, "[d]isability benefits should not, either in form or substance, be treated as marital property subject to division upon the dissolution of marriage." *Id.*

The court concluded that that was "precisely what happened in the case" at hand, because the court had

exactly replaced Dorothy's MRP income with a new obligation of support imposed on James. *Id.* Accordingly, the order sought to "regain the status quo as if the *Mansell* decision did not exist," and its "effect . . . was to divide retirement benefits that have been waived to receive disability benefits in direct contravention of the holding in *Mansell*." *Id.* The order approved by the Arizona Supreme Court in the decision below is materially identical to the order at issue in *Clauson*—Petitioner was ordered to exactly replace the lost MRP income to his former spouse—and therefore is unlawful under the Alaska Supreme Court's interpretation of federal law.

5. The Nebraska Supreme Court has taken the same position as well. *Kramer v. Kramer*, 567 N.W.2d 100 (Neb. 1997). Kathleen and Kenneth Kramer divorced in 1991. *Id.* at 103-04. At the time of the divorce, Kenneth had retired from the Air Force and was receiving MRP. The final divorce decree provided that "[Kathleen] is awarded 46% of [Kenneth's] military pension with the United States Air Force." *Id.* Kenneth therefore began making monthly payments to Kathleen. In 1994, the VA determined that Kenneth was eligible for disability compensation, and also made this benefit retroactive to his initial application in 1992. Kenneth waived a portion of his MRP in favor of disability compensation, and this waiver was also made retroactive to 1992. *Id.*

Both parties filed suit, and the Nebraska Supreme Court decided both actions together. First, Kenneth sought to recoup the portion of the MRP that he had been required to pay Kathleen before 1994 that was, by

operation of his later election of disability compensation, retroactively waived in favor of disability compensation. Second, Kathleen sought to modify the divorce decree to increase Kenneth's alimony obligation on the ground that the reduction in MRP effected a material change in the parties' relative economic circumstances.

As to the first claim, the court held that Kathleen was obligated to repay the relevant portion of the MRP she had previously received. As the court explained, "[t]o permit her to retain this overpayment would have the effect of awarding her a percentage of the husband's disability benefits, which is prohibited by [the USFSPA]." *Id.* at 110. In other words, once that money was converted from MRP to disability compensation (albeit retroactively), *Mansell* barred the divorce decree from ordering Kenneth to pay it to Kathleen, and Kathleen therefore lacked a legal claim to it. *Id.* at 109-10. This holding is in accord with the rule that post-divorce conversions to disability compensation remain subject to *Mansell*, and it squarely conflicts with the interpretation of *Mansell* adopted by the decision below.

As to the second claim, the court embraced both the rule and the reasoning of the Alaska Supreme Court in *Clauson*. Specifically, the court held that, in assessing the relative economic circumstances of the parties, a family court may consider (alongside all other relevant facts) the fact that Kenneth now receives disability compensation and Kathleen now receives diminished MRP payments. The court underscored, however, that its "holding does not permit the district court to treat

service-connected disability benefits as divisible marital property in form or substance." *Id.* at 113 (citing *Clauson*, 831 P.2d 1257). The court insisted that lower courts heed this "significant limitation" on their power to order "redistribution" in response to a post-divorce conversion to disability compensation. *Id.* at 111.

* * *

The supreme courts of Vermont, Mississippi, Alabama, Alaska, and Nebraska thus have all held that *Mansell* and the USFSPA bar court orders that seek to "make whole" a former spouse whose MRP income has been reduced as a consequence of a veteran's disability-based waiver. Each has specifically rejected the proposition—endorsed by the highest courts of Maine, Tennessee, Massachusetts, Rhode Island, and now Arizona—that when a veteran waives MRP in favor of disability compensation *after* a divorce, the court may order the veteran to offset the reduction in the former spouse's MRP.

As the courts on both sides of the split have recognized, this division is stark and entrenched. *See, e.g.*, Pet. App. 6a ("Courts in other jurisdictions have divided on the issue."); *Youngbluth*, 6 A.3d at 684 ("State courts are split on this issue."); *Mallard*, 95 So. 3d at 1271 ("There is a split of authority on this question, and no clear majority view."); *Black*, 842 A.2d at 1284 ("Since *Mansell*, jurisdictions have divided on the question of whether the USFSPA limits the authority of state courts to grant relief when, as here, a postjudgment conversion of retirement pay to disability pay divests the share of retirement pay

allocated to a former spouse in an earlier divorce judgment.").

Both sides can claim a number of intermediate appellate courts as adherents as well.[6] These decisions are also due significant weight in gauging the breadth and depth of the split in authority. Because most state supreme courts (unlike the federal courts of appeals) exercise discretionary review, there is no reason to assume that they will all decide this issue eventually. Rather, if the state supreme court is content with the rule put in place by an intermediate appellate court—which, at a minimum, suffices to impose uniformity within the state—it will often let that precedent stand. *See, e.g., In re Marriage of Pierce*, 982 P.2d 995, 998 (Kan. Ct. App.) (holding that a court "cannot order [a veteran] to pay his disability benefits to [his former spouse," and "the court may not do indirectly what it cannot do directly"), *rev. denied*, 268 Kan. 887 (1999); *Dexter v. Dexter*, 661 A.2d 171, 175 n.4 (Md. Ct. Spec. App.) (holding that a veteran may be required to reimburse a former spouse for the diminution in her MRP payments, because such an order does not "hinder [the veteran's] receipt of VA disability benefits"), *cert. denied*, 341 Md. 27 (1995). The split in authority in the

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[6] *See, e.g., Black*, 842 A.2d at 1284 n.3 (citing decisions in California, New Mexico, and Virginia that read *Mansell* narrowly, and contrasting them with decisions in Arkansas and Kansas that read it broadly); *Krapf*, 786 N.E.2d at 325-26 (citing decisions in Maryland, Montana, and Ohio that favor indemnification orders despite *Mansell*); *Youngbluth*, 6 A.3d at 688-89 (citing decisions in Kansas, Michigan, and Hawaii that prohibit indemnification orders based on *Mansell*).

states is thus even more entrenched than the ten supreme court decisions discussed above would suggest.

At this stage—twenty-seven years after *Mansell*—the issue has been fully aired. Accordingly, there is nothing to be gained by leaving the debate to continue in the lower courts. Rather, in the absence of this Court's intervention, the state courts that have not yet ruled will simply be left to choose between the two fully developed positions that are already on offer. Only review by this Court can resolve which of those interpretations of federal law is correct.

II. This Case Presents A Recurring Issue Of National Importance.

This Court's review is warranted because the question presented, which recurs frequently in the state courts, is of vital importance to both the Nation's veterans and their former spouses.

The decisions canvassed above confirm that the question at issue here has arisen frequently in the state courts and will continue to do so. Indeed, the Vermont Supreme Court alone identified two dozen cases in various states' appellate courts that concern whether a former spouse can assert a state-law right to "receive an increased percentage [of MRP] to offset the military servicemember's subsequent application and receipt of disability benefits." *Youngbluth*, 6 A.3d at 686-87 (collecting cases). Moreover, many family-law decisions that implicate this question are likely not appealed, and there is no reliable method to survey the vast universe

of unreported divorce decrees and enforcement or modification orders in state family and trial courts.

It is not surprising that this issue arises frequently in the state courts. Nearly 2 million veterans received MRP in 2014. Office of the Actuary, U.S. Dep't of Defense, *Statistical Report on the Military Retirement System: Fiscal Year 2014*, at 18 (2015) [hereinafter "DOD Report"]. That number has climbed by roughly 100,000 people every five years, confirming that the question presented here is of mounting importance. *Id.* at 17-18. More than one in four current military retirees has waived a portion of MRP in favor of disability compensation. *Id.* at 154. It follows that there are hundreds of thousands of veterans for whom the proper treatment of disability compensation in a divorce proceeding is, or may become, a pressing concern—as well as hundreds of thousands of military spouses to whom the issue is equally important.[7] Because every state has elected to treat MRP as divisible property pursuant to the USFSPA, the post-divorce conversion question, too, will arise in every state. *See Krapf*, 786 N.E.2d at 320 n.4 (reporting that, as of 2003, "every State appears to consider military retirement pay to be divisible marital property").

The question is also important to both military retirees and their former spouses because MRP—including the waived portion that can be divided after divorce in some states, but not others—is often a vital

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[7] *See* DOD Report at 240 (indicating that roughly half of military retirees have named a spouse as a beneficiary of survivor benefits).

source of economic support for the parties involved. *See, e.g., Krapf*, 786 N.E.2d at 324 (noting that "the defendant's military pension was among [the couple's] most substantial marital assets"). The average VA waiver in 2014 was $332 per month—7.4% of the median household income in the United States. *See* DOD Report at 154; U.S. Census Bureau, *Income and Poverty in the United States: 2014*, at 5 (2015). Under the status quo, either many veterans' federal rights to this source of economic support are wrongfully being subordinated to state law, or, alternatively, many of their former spouses are wrongfully being denied this same source of support based on an errant over-reading of what federal law requires. One or the other of these descriptions is accurate—and either circumstance would warrant this Court's review.

III. This Case Offers An Ideal Vehicle For Resolving The Question Presented.

This case presents an excellent opportunity for the Court to resolve the question presented and provide the needed guidance to state courts. The Arizona Supreme Court squarely decided the question presented, and it cleanly separated this issue—which would independently have required a judgment in Petitioner's favor—from the logically distinct questions of state law. Pet. App. 5a-8a. The case also has three further characteristics that help to narrow the issues and ensure that this Court can address the question presented in its clearest possible form.

First, the family court in this case specifically ordered Petitioner to "ensur[e] [Respondent] receive[s] her full 50% of the military retirement without regard

for the disability." *Id.* at 28a. In so doing, it blatantly ordered Petitioner to "reimburse the ex-spouse for reducing his or her share of MRP." *Id.* at 8a. The decision below therefore presents the challenge to the scope of this Court's holding in *Mansell* in its purest form. By contrast, a more difficult question may be presented when a family court modifies a divorce decree to incorporate a material change in the parties' relevant economic situations, taking account of the veteran's waiver of MRP in favor of disability compensation as one contributor to that change. *See Kramer*, 567 N.W.2d at 113 (noting the possibility of that scenario); *Clauson*, 831 P.2d at 1264 (same). In such cases, ambiguities in the state court record concerning whether, or to what extent, the state court incorporated the veteran's MRP waiver into its analysis may present barriers to this Court's review. That difficulty is not present here because the court made no such holistic assessment, and it invoked no such authority. Rather, it simply ordered Petitioner to indemnify Respondent for the reduction in her income on a dollar-for-dollar basis. This case therefore unambiguously presents the question of whether such an order is preempted by federal law.

Second, some cases in this area present challenging questions about the validity of provisions incorporated in a divorce decree that *specifically require* a veteran to indemnify a former spouse for subsequent reductions in MRP. *See Youngbluth*, 6 A.3d at 688 (contrasting, on this basis, *Morgan v. Morgan*, 249 S.W.3d 226, 233 (Mo. Ct. App. 2008), and *In re Marriage of Strassner*, 895 S.W.2d 614, 616 (Mo. Ct. App. 1995)). For instance, in

Strassner, a divorce decree specifically prohibited a veteran from taking any action that would diminish his former spouse's MRP and required him to indemnify her for any loss she might suffer as a result of his breach of this duty. 895 S.W.2d at 616. Similarly, in *Abernethy v. Fishkin*, 699 So. 2d 235 (Fla. 1997), the court upheld an indemnification order because the settlement agreement specifically "guarantee[d] a steady monthly payment to a former spouse through an indemnification provision providing for alternative payments to compensate for a reduction in non-disability retirement benefits." *Id.* at 236-37.

Cases of that kind present an analytically distinct question: "whether a trial court's order prohibiting a spouse from waiving retirement benefits in the future or, in the event of breach, requiring the spouse to indemnify the other spouse for such waived benefits is a prohibited division of disability benefits." *Strassner*, 699 So. 2d at 617; *see also Billeck*, 777 So. 2d at 109 (noting the possible effect of an "indemnification provision"). Cases of that kind may also present ambiguities as to whether the divorce court was interpreting the divorce decree to contain such an explicit indemnification provision, or was merely applying a generally-applicable rule that a veteran who waives MRP after a divorce must indemnify his ex-spouse. Such ambiguities would be impediments to this Court's review: threshold questions as to the state-law basis for a divorce court's order would complicate this Court's analysis of whether the order is permissible under federal law.

Here, however, neither the analytically distinct legal question nor the ambiguity is presented. The Arizona Supreme Court went out of its way to hold that, as a matter of state law, the divorce court's order modified the decree, and did not enforce a pre-existing indemnification provision. As the Arizona Supreme Court explained, "[b]ecause the decree did not require [Petitioner] to indemnify [Respondent] for her loss of MRP, the 2014 Order necessarily modified the original property disposition terms." Pet. App. 10a; *see id.* ("The 2014 Order modifies rather than enforces the dissolution decree's property disposition terms[.]"). This case therefore directly presents the question whether a state court may order reimbursement when previously divided MRP is diminished by a post-divorce disability waiver.

Finally, some courts have noted that the analysis of post-divorce waiver cases is complicated by the possibility of fraud on the part of the military retiree. *See, e.g.*, *Youngbluth*, 6 A.3d at 691-95 (Johnson, J., concurring). When a veteran enters into a property settlement based on the division of MRP, and then promptly waives MRP in favor of disability compensation, that concern is understandable. *See id.* at 691-92 (noting that the military spouse in *Youngbluth* applied for disability compensation one month after the divorce decree became final). This case presents no such complication. Petitioner and Respondent divorced in 1991, and both received equal MRP payments from 1992 to 2005. App 2a-3a. Petitioner did not even submit his disability claim until thirteen years after the divorce. *Id.* at 24a.

Because this case presents the central question that defines the split of authority in its clearest form, stripped of any extraneous factual complications, it offers an unusually good vehicle and warrants this Court's review.

IV. The Decision Below Is Incorrect.

Finally, the Arizona Supreme Court's decision warrants this Court's review because it is wrong.

In *Mansell*, this Court held that under the USFSPA, the portion of a military retiree's MRP that is waived in favor of disability compensation may not be divided between the veteran and his or her former spouse. 490 U.S. at 583. As the Court explained, Congress intended the statute "both to create new benefits for former spouses and to place limits on state courts designed to protect military retirees." *Id.* at 594. It did so by permitting state courts to divide military pensions in divorce, while specifically excluding the portion of a pension that a veteran must forgo to claim disability compensation, the division of which would amount to dividing the disability compensation itself. *See id.* at 588-89. The Court therefore held that this portion of a veteran's MRP remains subject to the rule of *McCarty*, which recognized it as an asset "that Congress intended ... [to] reach the veteran and no one else." *Id.* at 584; *see McCarty*, 453 U.S. at 232 (characterizing MRP as a "personal entitlement" reserved for military retirees).

As a matter of economic substance, the situation presented in this case is simply indistinguishable from the facts of *Mansell*. As modified by the family court,

the divorce decree now directs Petitioner to pay his former spouse (a) half of his MRP, plus (b) half of an amount equivalent to the portion of MRP that was converted to disability compensation (call that sum a + b). Yet *Mansell* held that a divorce court may award an ex-spouse *only* MRP, and may *not* award an amount equivalent to the portion of MRP that was converted to disability compensation. Thus, *Mansell* held that an *initial* divorce decree could not, under federal law, award a sum equivalent to $a + b$. It cannot possibly be the law that *Mansell* merely prohibited such decrees as an *initial* matter, but permitted such decrees if they arose as a result of a divorce court's modification order.

It is no answer for Respondent to argue that she acquired a vested interest in receiving a monthly payment corresponding to half of Petitioner's pre-waiver MRP. The whole point of *Mansell* is that federal law *prohibits* the creation of such a vested interest. Under federal law, a divorce decree can divide MRP, but it cannot divide the portion of MRP that is waived in order to receive disability compensation. A state court cannot evade this federal rule by creating a state-law entitlement to the very assets that federal law prohibits state courts from dividing.

It is true that, under Petitioner's position, a veteran may unilaterally reduce the compensation of his former spouse by electing to take disability benefits. But precisely the same was true in *Mansell* as well. Indeed, the dissent in that case argued that as a result of the majority's holding, "former spouses like Gaye Mansell can, without their consent, be denied a fair

share of their ex-spouse's military retirement pay simply because he elects to increase his after-tax income by converting a portion of that pay into disability benefits." 490 U.S. at 595 (O'Connor, J., dissenting). The majority, however, held that awarding disability compensation in a divorce decree was nonetheless preempted. Granting that "reading the statute literally may inflict economic harm on many former spouses," the majority nonetheless "decline[d] to misread the statute in order to reach a sympathetic result." *Id.* at 594 (majority opinion). Identical reasoning applies here. The USFSPA does not distinguish between disabilities discovered before and after a divorce. Under the USFSPA, Petitioner's disability compensation is an asset "that Congress intended . . . [to] reach the veteran and no one else." *Id.* at 584. He thus should be permitted to keep that asset, regardless of whether his former spouse's monthly payments will decrease as a result.[8]

The Arizona Supreme Court also reasoned that the trial court's order "did not divide the MRP subject to the VA waiver, order [Petitioner] to rescind the waiver, or direct him to pay any amount to

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[8] Indeed, even *Mansell* itself arose as a result of the veteran's post-divorce unilateral action. In *Mansell*, the veteran initially agreed to "a property settlement which provided, in part, that Major Mansell would pay Mrs. Mansell 50 percent of his total military retirement pay, including that portion of retirement pay waived so that Major Mansell could receive disability benefits." 490 U.S. at 586. The litigation arose when Major Mansell asked that the divorce decree be modified four years after the divorce. *Id.*

[Respondent] from his disability pay." Pet. App. 7a; *see also Black*, 842 A.2d at 1285 (adopting the same distinction as the decision below); *Krapf*, 786 N.E.2d at 326 (same); *Johnson*, 37 S.W.3d at 898 (same); *Resare*, 908 A.2d at 1010 (same). But the Arizona Supreme Court's rationale that a court may order Petitioner to pay Respondent the precise *amount* of her putative interest in his disability compensation—so long as the court does not require him to pay "*from* his disability pay"—rests on an untenable economic and legal fiction. "Money is fungible." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010); *Sabri v. United States*, 541 U.S. 600, 606 (2004) (same). Moreover, the Court has already rejected this very distinction in analogous circumstances. In *Wissner v. Wissner*, 338 U.S. 655 (1950), a service member had named his parents, rather than his spouse, as the beneficiaries of a federal life insurance policy. After the service member died, a state court concluded that the insurance proceeds were community property under state law and therefore ordered the parents to pay half of the sum to the widow. *Id.* at 658. This Court held the order preempted by the federal statute authorizing a service member to choose his or her beneficiary. As the Court explained: "*Whether directed at the very money received from the Government or an equivalent amount*, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It cannot stand." *Id.* at 659 (emphasis added).

That rule applies equally here. There is no economic difference between an order requiring

Petitioner to turn over 50% of his disability compensation, and an order requiring Petitioner to turn over a sum of money identical to 50% of his disability compensation. Indeed, by the Arizona Supreme Court's rationale, if the decree in *Mansell* had stated that Mrs. Mansell was entitled to receive "Mr. Mansell's retirement pay, plus a sum of money identical to the sum of money that Mr. Mansell waived when he began collecting disability pay," such an order would have complied with federal law. It is exceedingly unlikely that this Court would have adopted such a meaningless distinction.

The Court explained in *Mansell* that "Congress chose the language that requires us to decide as we do, and Congress is free to change it." 490 U.S. at 594. Congress declined to do so, and has instead now left *Mansell*'s protection for a veteran's disability compensation in place for nearly three decades. The Arizona Supreme Court therefore erred by substituting its judgment for the balance struck by Congress in the USFSPA and heeded by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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February 16, 2016

APPENDIX

Appendix A

IN THE

SUPREME COURT OF THE STATE OF ARIZONA

IN RE THE MARRIAGE OF:

SANDRA HOWELL,
Petitioner/Appellee,

and

JOHN HOWELL,
Respondent/Appellant.

No. CV-15-0030-PR
Filed December 2, 2015

Appeal from the Superior Court in Pima County
The Honorable Danelle B. Liwski, Judge
No. D78235
AFFIRMED

Memorandum Decision of the Court of Appeals,
Division Two
2 CA-CV 2014-0112
Filed Dec. 18, 2014
VACATED

COUNSEL:

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Barry G. Nelson, Law Office of Barry Nelson, Cortaro; and Keith Berkshire (argued), Maxwell Mahoney, Berkshire Law Office, PLLC, Phoenix, Attorneys for John Howell

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JUSTICE TIMMER authored the opinion of the Court, in which CHIEF JUSTICE BALES, VICE CHIEF JUSTICE PELANDER and JUSTICES BRUTINEL and BERCH (RETIRED) joined.

JUSTICE TIMMER, opinion of the Court:

¶1 Federal law prohibits courts in marital dissolution proceedings from dividing any portion of military retirement pay ("MRP") waived by a retired veteran to receive service-related disability benefits. In 2010, the Arizona Legislature enacted A.R.S. § 25-318.01 to prohibit courts from "making up" for the resulting reduction in MRP by awarding additional assets to the non-military ex-spouse. The issue before us is whether federal law or § 25–318.01 prohibits courts from fashioning such relief when the veteran elects to waive retirement pay after the court has awarded the ex-spouse a share of MRP in a decree entered before 2010. We hold that neither federal law nor § 25-318.01 precludes such an order.

I. BACKGROUND

¶2 John Howell and Sandra Howell divorced in 1991. Pursuant to the parties' agreement, the dissolution decree provides that "[Sandra] is entitled to and is awarded as her sole and separate property FIFTY PERCENT (50%) of [John's] military retirement when it begins through a direct pay order." John retired from the Air Force in 1992 after a

twenty-year career, and the parties began receiving MRP the next year.

¶3 In 2005, the Department of Veterans Affairs ("VA") approved John's claim that degenerative joint disease in his shoulder directly related to his military service. The VA assigned him a twenty percent disability rating to reflect the extent of his impairment for civilian employment. *See* 38 C.F.R. § 4.1 (explaining the rating system). He qualified for monthly, tax-exempt VA disability payments, which increased yearly. *See* 38 U.S.C. § 5301(a) (bestowing tax-exempt status). To prevent "double dipping," *Mansell v. Mansell*, 490 U.S. 581, 583 (1989), a veteran who receives MRP cannot collect VA disability benefits unless the veteran waives an equivalent amount of MRP (a "VA waiver"), *see* 38 U.S.C. §§ 5304-5305. John elected a VA waiver that was effective from July 1, 2004, the day after he filed his claim with the VA.

¶4 As a result of the VA waiver, the Defense Finance and Accounting Service ("DFAS"), which administers MRP, reduced monthly payments to both John and Sandra, and John began collecting VA disability benefits. For example, John's gross MRP in October 2013 was $1,474. DFAS subtracted the VA waiver amount of $255 to calculate $1,219 in disposable pay and then paid John and Sandra $609.50 each. Simultaneously, the VA paid John $255 in disability benefits. But for the VA waiver, Sandra would have received an additional $127.50 per month.

¶5 In 2013, Sandra filed a motion to enforce the decree's division of MRP and also sought judgment against John for an arrearage amount equaling the

reductions in her share of MRP after the VA waiver. John moved to dismiss the request, arguing that A.R.S. § 25-318.01 barred the family court from requiring John to indemnify Sandra for the reduction in her share of MRP. The court granted Sandra's motion, ruling that she had a vested property right in fifty percent of the MRP, and neither John's election nor § 25-318.01 could deprive her of this right. After an evidentiary hearing, the court awarded Sandra $3,813 in MRP arrearages incurred after December 1, 2011, but found that the equitable doctrine of laches prevented her from recovering earlier arrearages (the "2014 Order"). It also ruled that "[John] is responsible for ensuring [Sandra] receive[s] her full 50% of the military retirement without regard for the disability."

¶6 The court of appeals affirmed but for a different reason. *In re the Marriage of Howell*, 2 CA-CV 2014-0112 (Ariz. App. Dec. 18, 2014) (mem. decision). It held that § 25-318.01, by its terms, does not apply to post-decree enforcement proceedings, such as the one Sandra initiated, and the family court therefore correctly refused to apply the statute. *Id.* at 4–5 ¶¶ 8-9. Sandra did not appeal the family court's laches ruling.

¶7 We granted review because the interpretation of § 25-318.01 is a recurring issue of statewide importance. We have jurisdiction pursuant to article 6, section 5(3) of the Arizona Constitution and A.R.S. § 12-120.24.

II. DISCUSSION

A. Federal preemption

¶8 John argues that, regardless of the applicability of § 25-318.01, the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 ("USFSPA"), and *Mansell*, 490 U.S. at 583, preempt the family court's authority to order John to indemnify Sandra for the reduction of her MRP share. Sandra responds, and the court of appeals agreed, that John waived this argument by raising it for the first time on appeal.

¶9 Although generally we refuse to consider arguments newly raised on appeal, this is a prudential rule, and we have made exceptions to consider issues of public importance or that are likely to recur. *Estate of DeSela v. Prescott Unified School Dist. No. 1*, 226 Ariz. 387, 389 ¶ 8, 249 P.3d 767, 769 (2011). Such reasons exist here. Also, the federal preemption issue is a legal one and the parties have fully briefed it. For these reasons, we consider John's arguments.

¶10 The United States Supreme Court and Congress have each addressed whether state courts can divide MRP and disability benefits in dissolution proceedings. In 1981, the Court held that federal law precludes a state court from dividing MRP because doing so would contradict Congress's intent that veterans have "personal entitlement" to such benefits. *McCarty v. McCarty*, 453 U.S. 210, 223–24 (1981). In response to *McCarty*, Congress enacted the USFSPA, which allows states to treat "disposable retired or retainer pay . . . either as property solely

of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C. § 1408(c)(1); *see also Edsall v. Superior Court*, 143 Ariz. 240, 241–42, 693 P.2d 895, 896–97 (1984) (noting that the USFSPA made MRP subject to Arizona's community property laws). A few years later, the Court in *Mansell* clarified that although the USFSPA permits state courts to divide disposable MRP in a marital dissolution proceeding, it prohibits them from dividing MRP that has been waived to receive disability benefits. *Mansell*, 490 U.S. at 589.

¶11 In the years following *Mansell*, our court of appeals has several times considered how the family court should proceed when a veteran elects a VA waiver to receive disability benefits *after* entry of a dissolution decree, thereby reducing the ex-spouse's share of previously awarded MRP. In *Harris v. Harris*, 195 Ariz. 559, 562 ¶ 13, 991 P.2d 262, 265 (App. 1999), for example, the court held that *Mansell* does not bar the family court from ordering the veteran to reimburse the ex-spouse for a reduced share of MRP. The court of appeals reached similar conclusions in other cases. *See Danielson v. Evans*, 201 Ariz. 401, 407 ¶ 19, 36 P.3d 749, 755 (App. 2001); *In re Marriage of Gaddis*, 191 Ariz. 467, 469–70, 957 P.2d 1010, 1012–13 (App. 1997). Courts in other jurisdictions have divided on the issue. *See* Mark E. Sullivan & Charles R. Raphun, *Dividing Military Retired Pay: Disability Payments and the Puzzle of the Parachute Pension*, 24 J. Am. Acad. Matrim. Law 147, 158 (2011) ("The large majority of states allow a judge to use equitable

remedies to prevent a retiree from effecting a unilateral reduction of [MRP] granted to the other spouse in the settlement or divorce decree."). *But see Mallard v. Burkart*, 95 So. 3d 1264, 1271 (Miss. 2012) (disagreeing that a clear majority viewpoint exists).

¶12 John argues that the *Harris* line of cases, and the family court here, crafted an equitable remedy barred by the USFSPA and *Mansell*. He quotes *Mansell*'s pronouncement that "the [USFSPA] does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits," 490 U.S. at 594–95, and contends that this proscription also applies to post-decree modification proceedings.

¶13 We agree that the family court cannot divide MRP that has been waived to obtain disability benefits either at the time of the decree or thereafter. But unlike the situation in *Mansell*, that did not occur here. Sandra was awarded fifty percent of the MRP years before John unilaterally elected to receive disability pay in lieu of a portion of the MRP. The 2014 Order did not divide the MRP subject to the VA waiver, order John to rescind the waiver, or direct him to pay any amount to Sandra from his disability pay. Under these circumstances, the family court did not violate the USFSPA or *Mansell* because it did not treat the MRP subject to the VA waiver as divisible property.

¶14 Although requiring John to reimburse Sandra diminishes the overall income increase he received

when he elected the VA waiver (he retains the tax benefits of disability payments), we are not persuaded that the USFSPA prohibits this result. As the *Mansell* Court recognized, "[b]ecause domestic relations are preeminently matters of state law . . . Congress, when it passes general legislation, rarely intends to displace state authority in this area." *Mansell*, 490 U.S. at 587. The Court will not find federal preemption, therefore, "absent evidence that it is 'positively required by direct enactment.'" *Id.* (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979)).

¶15 Nothing in the USFSPA directly prohibits a state court from ordering a veteran who makes a post-decree VA waiver to reimburse the ex-spouse for reducing his or her share of MRP. Absent such direct prohibition, we decline to find federal preemption.

B. Applicability of A.R.S. § 25-318.01

1. Enforcement versus modification

¶16 John argues that the court of appeals evaded the plain language of § 25-318.01 by characterizing the 2014 Order as "enforcing" the dissolution decree rather than as "modifying" it to require indemnification. Section 25-318.01 provides:

> In making a disposition of property pursuant to § 25-318 or § 25-327, a court shall not do any of the following:
>
> 1. Consider any federal disability benefits awarded to a veteran for service-connected disabilities pursuant to 10 United States Code

section 1413a or 38 United States Code chapter 11.

2. Indemnify the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to the receipt of the disability benefits.

3. Award any other income or property of the veteran to the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to the receipt of the disability benefits.

See also A.R.S. § 25-530(A) ("In determining whether to award spousal maintenance or the amount of any award of spousal maintenance to a requesting party, the court shall not consider any federal disability benefits awarded to the other spouse for service-connected disabilities pursuant to 10 United States Code section 1413a or 38 United States Code chapter 11.").

¶17 By its express language, § 25-318.01 applies only to property dispositions made pursuant to §§ 25-318 and -327. Section 25-318 governs the division of property in legal separation or marriage dissolution proceedings, while § 25-327 applies when a party seeks to revoke or modify a previously ordered division of property. But nothing in § 25-318.01 restricts the family court's ability to enforce a disposition order. *Cf. In re Marriage of Dougall*, 234 Ariz. 2, 8 ¶ 19, 316 P.3d 591, 597 (App. 2013) (deciding that nothing in § 25-530 prevented the court from considering VA

disability benefits in determining the payment of arrearages stemming from an existing spousal maintenance award). The issue here is whether the family court modified the dissolution decree's property disposition terms pursuant to § 25-327, thereby triggering § 25-318.01, or merely enforced the decree. Because resolution of this issue turns on both statutory interpretation and the 2014 Order's meaning, we conduct a de novo review. *See Danielson*, 201 Ariz. at 406 ¶ 13, 36 P.3d at 754.

¶18 The 2014 Order modifies rather than enforces the dissolution decree's property disposition terms, and § 25-318.01 therefore applies. The decree awarded Sandra fifty percent of John's MRP, regardless of the amount, and DFAS paid her that percentage each month. It was not necessary to "enforce" the decree as DFAS was honoring its terms. Instead, Sandra sought to redress a changed circumstance: John had reduced the MRP amount by electing a VA waiver. Unable to order John to rescind election of a benefit bestowed by Congress, *see* U.S. Const. art. VI, cl. 2, the family court ordered John to pay Sandra for her reduced share of MRP. Because the decree did not require John to indemnify Sandra for her loss of MRP, the 2014 Order necessarily modified the original property disposition terms. As a result, despite Sandra's request that the family court enforce the decree, the family court necessarily modified the initial property disposition terms pursuant to § 25-327, and § 25-318.01 therefore applies. Consequently, the court of appeals erred by holding that § 25-318.01's plain language makes its restrictions inapplicable here. We

therefore consider whether the family court properly refused to apply § 25-318.01 because to do so would have unconstitutionally deprived Sandra of a vested property right.

2. Vested property rights

¶19 Both parties acknowledge that Sandra obtained a vested property right in her share of MRP when the family court entered the decree in 1991. *Cf. Koelsch v. Koelsch*, 148 Ariz. 176, 181, 713 P.2d 1234, 1239 (1986) ("When the community property is divided at dissolution . . . each spouse receives an immediate, present, and vested separate property interest in the property awarded to him or her by the trial court . . . [and] a former spouse loses any interest in and control over that separate property."). They differ, however, on the scope of that right. John contends that Sandra has a vested right in fifty percent of whatever amount of MRP is paid by DFAS each month. He characterizes her interest in the precise amount of those payments as merely expectant and argues that § 25-318.01 therefore can apply to diminish that interest. Sandra counters that she possesses a vested property right in the amount of her MRP share as calculated by DFAS and unencumbered by any adjustments unilaterally initiated by John. She contends that neither John's election of the VA waiver nor subsequent legislation could affect that right without depriving her of a vested property right.

¶20 We begin by examining the categories of property rights. A property right becomes vested "when every event has occurred which needs to occur to make the implementation of the right a

certainty." *Aranda v. Indus. Comm'n of Ariz.*, 198 Ariz. 467, 471 ¶ 18, 11 P.3d 1006, 1010 (2000). The right is "actually assertable as a legal cause of action or defense or is so substantially relied upon that retroactive divestiture would be manifestly unjust." *Id.* (quoting *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 200 ¶ 15, 972 P.2d 179, 184 (1999)). By contrast, a right is expectant when it depends on the continued existence of present circumstances "until the happening of some future event." *Id.* at 471–72 ¶ 21, 11 P.3d at 1010–11 (citation omitted). A contingent right is one that comes into existence only if a specified event or condition occurs. *Id.* at 472 ¶ 21, 11 P.3d at 1011.

¶21 In this case, Sandra had a vested right to receive future distributions of her share of MRP unencumbered by any adjustments initiated by John. MRP is a form of deferred compensation. *Van Loan v. Van Loan*, 116 Ariz. 272, 274, 569 P.2d 214, 216 (1977). Thus, the MRP earned during the parties' marriage belonged to the community and was divisible upon dissolution of the marriage. *See id.* After the dissolution decree became final and the corresponding qualified domestic relations order issued, nothing more needed to occur to entitle Sandra to fifty percent of the MRP; it had already been earned. *See* 10 U.S.C. § 1408(d) (requiring payment of disposable MRP share to ex-spouse upon receipt of court order). Additionally, both parties' shares, which were subject to equal cost-of-living and other adjustments, could be precisely calculated by DFAS each month and did not depend on any future event or

contingency. *See* 10 U.S.C. §§ 1401–1414 (establishing methods for computing monthly MRP payments); *see also Koelsch*, 148 Ariz. at 184 n.9, 713 P.2d at 1242 n.9 (characterizing cost-of-living increases to pension benefits attributable to the marital community as a community asset). Under these circumstances, the decree created an immediate right to future payment of fifty percent of the MRP, including cost-of-living increases, earned during the marriage as calculated by DFAS. That amount vested as Sandra's property right and is not merely expectant.

¶22 One spouse cannot invoke a condition solely within his or her control to defeat the community interest of the other spouse. *Koelsch*, 148 Ariz. at 181, 713 P.2d at 1239. By electing the VA waiver, John did precisely that by essentially converting part of Sandra's MRP share. The 2014 Order restored Sandra's share of community assets by ordering John to "make up" the reduction and pay arrearages. The remaining issue here is whether the family court erred by ruling that § 25-318.01 could not prohibit indemnification in these circumstances.

¶23 Once a property right vests, the due process guarantee of our constitution, Ariz. Const. art. 2, § 4, prohibits application of legislation that "[would] disturb vested substantive rights by retroactively changing the law that applies to completed events." *San Carlos Apache Tribe*, 193 Ariz. at 205 ¶ 15, 972 P.2d at 189; *see also Aranda*, 198 Ariz. at 471 ¶ 16, 11 P.3d at 1010 (to same effect). John concedes that "if Sandra [had] obtained relief prior to 2010, newly enacted A.R.S. § 25-318.01 could not be retroactively

applied to change the result." He argues, however, that because Sandra sought relief after 2010, application of the statute would be prospective and therefore constitutional.

¶24 John's argument is unpersuasive. Sandra sought relief for the reduction of her MRP share, which vested as a property right in 1991. Regardless of the timing of her request, application of § 25-318.01 to prohibit the court from remedying the deprivation would diminish Sandra's vested property right in violation of the due process guarantee. Consequently, the family court correctly refused to apply § 25-318.01 to these facts.

III. CONCLUSION

¶25 We hold that federal law does not preempt the family court's authority to order a retired veteran to indemnify an ex-spouse for a reduction in MRP caused by a post-decree waiver of MRP made to obtain disability benefits. We also hold that A.R.S. § 25-318.01 cannot be applied to prohibit the court from entering an indemnification order in these circumstances if the ex-spouse's share of MRP vested as a property right before the statute's enactment. Because Sandra did not appeal the family court's application of laches in awarding arrearages dating only from 2011, we do not disturb that ruling. We vacate the court of appeals' decision and affirm the family court's judgment.

Appendix B

Court of Appeals of Arizona,
Division 2.

In re the Marriage of Sandra HOWELL,
Petitioner/Appellee.

And

John Howell,
Respondent/Appellant.

No. 2 CA-CV 2014-0112.

Dec. 18, 2014.

Appeal from the Superior Court in Pima County;
No. D78235; The Honorable Danelle B. Liwski, Judge.
AFFIRMED.

MEMORANDUM DECISION

HOWARD, Judge.

¶1 Appellant John Howell[1] appeals from the trial court's judgment in favor of his former wife, Sandra Howell, on her petition to enforce the decree of dissolution awarding her fifty percent of his military retirement benefits. John argues that the court erred

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[1] John originally filed a cross-appeal in response to Sandra's appeal. Sandra withdrew her appeal, and we now treat John as the appellant.

under both state and federal law in awarding Sandra arrearages and ordering prospective payments from John to Sandra to reimburse her for any portion of the fifty percent she did not receive because John had waived a portion of his retirement benefits in favor of military disability pay. Because the trial court did not err, we affirm.

Factual and Procedural Background

¶2 The facts necessary to deciding this appeal are not in dispute. In 1991, the trial court awarded Sandra fifty percent of John's military retirement benefits to be paid by direct pay order, and payments began in 1993. In 2005, John received a twenty-percent disability rating from the Department of Veterans Affairs ("VA") pursuant to Title 38 of the United States Code, and he waived a portion of his retirement benefits in favor of disability payments, which caused a dollar for dollar reduction in his retirement benefit payments. As a result, the direct payments to Sandra on her share of the retirement benefits also were reduced.

¶3 In November 2013, Sandra filed a petition to enforce the military retirement provision in the decree.[2] In response, John filed a motion to dismiss the petition, alleging that A.R.S. § 25-318.01 prohibited Sandra from seeking indemnification for any reduction in retirement pay resulting from John's receipt of disability benefits.

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[2] Sandra's petition is entitled "Request to Enforce Support 50% Retirement Military." We note, however, the decree awarded her fifty percent of the military retirement benefits "as her sole and separate property," and not as part of her spousal maintenance award.

The trial court denied the motion on the grounds that application of § 25-318.01 would retroactively change Sandra's vested property rights. After an evidentiary hearing, the court awarded Sandra arrearages[3] and ordered that John "ensur[e Sandra] receive her full 50% of the military retirement without regard for disability" going forward. We have jurisdiction over John's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(2).

Failure to File an Answering Brief

¶4 Sandra failed to file an answering brief in this case. "When an appellant raises debatable issues, the failure to file an answering brief generally constitutes a confession of reversible error in civil cases." *State v. Greenlee Cnty. Justice Court, Precinct 2*, 157 Ariz. 270, 271, 756 P.2d 939, 940 (App.1988). But that doctrine is discretionary, and we are reluctant to apply it when there was no error below. *See In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶20,18P.3d 85,91 (App.2000). Therefore, we review the merits of John's appeal.

Applicability of A.R.S. § 25-318.01

¶5 John first argues the trial court erred by concluding that § 25-318.01 did not apply to this case. He contends the statute prohibits any post-decree award of other income or property to compensate for "postjudgment waiver or reduction in military

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[3] Due to Sandra's delay in seeking compensation for the reduction in benefits, the trial court applied the equitable doctrine of laches and awarded arrearages only from December 1, 2011, with no prejudgment interest.

retirement."§ 25-318.01. We review de novo the interpretation of statutes governing dissolution proceedings. *See Merrill* v. *Merrill*, 230 Ariz. 369, ¶ 7, 284 P.3d 880, 883 (App.2012).

¶6 Before the enactment of § 25-318.01, 2010 Ariz. Sess. Laws, ch. 70, § 2, this court determined that veterans could not frustrate the decree of dissolution unilaterally by waiving retirement pay in favor of other benefits not subject to division as community property in dissolution proceedings by operation of federal law. *Danielson* v. *Evans*, 201 Ariz. 401, ¶¶ 19-24,36 P.3d 749,755-56 (App.2001); *In re Marriage of Gaddis*, 191 Ariz. 467,469,957 P.2d 1010,1012 (App. 1997). Instead, we required the veterans in those cases to indemnify the former spouse for the loss to their share of the community property resulting from waiver. *Danielson*, 201 Ariz. 401, ¶¶ 19, 33,36 P.3d at 755,758-59; *Gaddis*, 191 Ariz, at 470, 957 P.2datl013.

¶7 In 2010, our legislature enacted § 25-318.01 and its counterpart A.R.S. § 25-530. 2010 Ariz. Sess. Laws, ch.70, §§ 2, 3; *see also* 2014 Ariz. Sess. Laws, ch. 239, §§ 1, 2 (expanding statutes to encompass both Title 10 and Title 38 disability pay). Section 25318.01 applies when the superior court "mak[es] a disposition of property pursuant to [A.R.S. §] § 25-318 or 25-327" and prohibits the court from considering "any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to the receipt of disability benefits" awarded under Title 38, chapter 11 of the United States Code or 10 U.S.C. § 1413a.

¶8 Section 25-318 governs the disposition of property "in a proceeding for dissolution of the

marriage, or for legal separation."Section 25-327 governs the modification or termination of "the provisions of any decree respecting maintenance or support," and the modification or revocation of "the provisions as to property disposition ... [under] conditions that justify the reopening of a judgment under the laws of this state."Sections 25-318 and 25-327 do not concern proceedings for the enforcement of the terms of the decree of dissolution. Accordingly, § 25-318.01, by its plain language, does not apply to post-decree enforcement proceedings. *See In re Marriage of Gibbs*, 227 Ariz. 403, ¶ 10, 258 P.3d 221, 225 (App.2011) (we interpret statutes according to their plain language).

¶9 The original property distribution in this case under § 25-318 occurred in 1991. Sandra did not attempt to modify the property distribution pursuant to § 25-327. Therefore, A.R.S. § 25318.01 did not apply to the enforcement proceedings initiated by Sandra, and the trial court was not prohibited from considering the reduction in her share of the retirement pay occasioned by John's receipt of disability pay. Rather, the 1991 decree entitled her to a full fifty-percent of the military retirement, and John must indemnify her for any reduction she suffered due to his unilateral waiver in favor of disability pay. *See Danielson*, 201 Ariz. 401, ¶ 19-24, 33, 36 P.3d at 755-56, 758-59; *Gaddis*, 191 Ariz, at 469-70, 957 P.2d at 1012-13.

¶10 John points to language from our decision in *Merrill* to support his contention that § 25-381.01 prohibits the trial court from considering waiver or reduction due to disability pay in any post-decree

proceedings. In *Merrill*, we stated that the application of § 25-318.01 to a "postjudgment waiver or reduction in military retirement" suggested the statute applied to " 'postjudgment' proceedings" as well as "an original decree of dissolution." 230 Ariz. 369, ¶ 24, 284 P.3d at 886. But this statement is dictum. *Id.* ¶¶ 24-25; *see also Creach v. Angulo*, 186 Ariz. 548, 552, 925 P.2d 689, 693 (App.1996) ("Dictum is not binding precedent...."). And we made it with reference to the statute's application to proceedings under § 25-327, "which governs a court's power, *inter alia*, to modify a dissolution decree's distribution of community property."*Merrill*, 230 Ariz. 360, ¶ 24, 284 P.3d at 886. As noted above, the reference in § 25-318.01 to § 25-327 indicates its applicability to post-decree proceedings for the modification or revocation of property distribution, not for the enforcement of a decree's property settlement terms.

¶11 Because we conclude that § 25-318.01 does not apply to these enforcement proceedings, we need not address John's second argument that the trial court erred by ruling the application of § 25318.01 would have changed Sandra's vested property rights retroactively.

Federal Preemption

¶12 John further argues that 10 U.S.C. § 1408(a)(4)(B), (c), which allows the division of "disposable retired pay" as community property in dissolution proceedings, but which subtracts from "disposable retired pay" amounts waived in order to receive disability pay under Title 38, prohibited the trial court's consideration of waived retirement pay. Yet he did not raise this argument below and therefore

has waived review of the issue on appeal. *See Chopin* v. *Chopin*, 224 Ariz. 425, ¶ 22, 232 P.3d 99, 105 (App.2010).

¶ 13 John claims in his opening brief that he raised this argument in his motion for reconsideration filed after the trial court ruled on the applicability of § 25-318.01. But to support this claim, he points only to one sentence in a block quote from our *Merrill* decision that states, "Federal law precludes division of [disability] benefits as community property."230 Ariz. 369, ¶18, 284 P.3d at 883, *citing* 10 U.S.C. § 1408(a) (4)(C). And the only argument John made in his motion for reconsideration was that the application of § 25318.01 in this case would have been prospective rather than retroactive, and therefore constitutional.

¶14 John's passing mention of the preemption issue in a block quote intended to support his argument on a different issue did not suffice to raise the issue to the court below. *See Airfreight Express Ltd.* v. *Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶17, 158 P.3d 232,238-39 (App.2007) (trial court "must have had the opportunity to address the issue on its merits"). Moreover, even if he had raised it in his motion, we do not review issues raised for the first time in a motion for reconsideration, and we would nonetheless deem the issue waived. *See Ramsey v. Yavapai Family Advocacy Ctr.*, 225 Ariz. 132, ¶18,235 P.3d 285, 290 (App.2010).

Disposition

¶15 For the foregoing reasons, we affirm the trial court's ruling.

Judge HOWARD authored the decision of the Court, in which Presiding Judge KELLY and Judge VASQUEZ concurred.

Appendix C

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. DANELLE B. LIWSKI CASE NO. D78235

COURT REPORTER: John Bouley DATE: May 22, 2014
Courtroom – 686

SANDRA K. HOWELL
Petitioner

VS.

JOHN Q. HOWELL
Respondent

RULING

UNDER-ADVISEMENT RULING—FAMILY LAW RE RETIREMENT ARREARS

On March 10, 2014 this Court found "that Respondent/Husband owed Petitioner/Wife 50% of the military retirement regardless of the disability rating as his election unilaterally alters a vested property right." The Court set a status conference on March 20, 2014 to determine the discovery needs of each party. The Court held a hearing on May 20, 2014 to determine

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Law Clerk

what Respondent/Husband owed in retirement arrearages.

The parties were divorced in 1991. The parties entered into an agreement on April 16, 1991. The agreement provided, "Petitioner is entitled to and is awarded as her sole and separate property FIFTY PERCENT (50%) of Respondent's military retirement when it begins through a direct pay order." This agreement was signed by the court as a Decree of Dissolution of Marriage on April 16, 1991. Payment of the military retirement began in 1992.

On January 25, 2005, Respondent/Husband received a disability evaluation of 20% from the Veteran Administration (VA). This disability evaluation was post dated to June 30, 2004 when Respondent/Husband first petitioned for his disability. Exhibit B. The disability rating given to Respondent/Husband was done under Title 38 Disability.

The effect of this disability rating was a dollar for dollar reduction of the military retirement pay in favor of disability pay. One effect of this election was a reduction in Petitioner/Wife's share of the retirement. Petitioner/Wife was dependent on and expecting this money.

Petitioner/Wife became aware of this change in 2005 when her monthly payment was reduced. Petitioner/Wife did not act. The first evidence of action made by Petitioner/Wife appears to be an inquiry she

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Law Clerk

made with the Department of Defense Finance and Accounting Service ("DFAS"). Based upon testimony and exhibit A this contact was made around December 1, 2011. Petitioner/Wife did not file to enforce the decree until November 6, 2013.

Respondent/Husband has raised the affirmative defense of laches to bar recovery of all arrearages dating to before December 1, 2013. "Laches, a form of estoppels, is a defense where, because of delay or by lapse of time, the party asserting the defense either is injured (by the mere lapse of time) or changes his position in reliance on the other party's inaction. Additionally, the delay must come after the party against whom the defense is asserted becomes aware of or has knowledge of, his right." *Jerger v. Rubin*, 106 Ariz. 114, 117, 471 P.2d 726, 729 (1970). "The elements necessary to constitute laches are lack of diligence on the part of one and injury to another due to the lack of diligence." *Longshaw v. Corbitt*, 4 Ariz. App. 408, 414, 420 P.2d 980, 986 (1966). "Fundamental fairness is the *sine qua non* of the laches doctrine." *Harris v. Purcell*, 193 Ariz. 409, 414, 973 P.2d 1166, 1171 (1998).

In this case, Petitioner/Wife had knowledge of the reduction in her retirement benefits and did nothing to inquire into what had happened. Respondent/Husband relied on her inaction and used the extra money he was receiving. Now, Petitioner/Wife wants to be made whole from damages that occurred a decade ago to the

Nathan Rothschild
Law Clerk

detriment of Respondent/Father who has depleted the misappropriated monies.

Respondent/Husband had met his burden to show that the doctrine of laches is applicable to this case. Petitioner/Wife did not act in a timely matter and to now make Respondent/Father pay the whole amount of misappropriated funds would be inequitable. The Court of Appeals have considered similar situations, "if the husband treated the asset as his separate property and disposed of it according to his needs, the doctrine of laches should be applied to prevent collection of the sums that have already been spent." *Flynn v. Rogers*, 172 Ariz. 62, 67, 834 P.2d 148, 153 (1992). *See also: Beltran v. Razo*, 163 Ariz. 505, 507, 788 P.2d 1256, 1258 (Ct. App. 1990). Using this rule it would be inequitable to hold Respondent/Husband accountable for money spent before Petitioner/Wife acted. Once Petitioner/Wife began to act to remedy the damage done to her equity requires that she be allowed to recover.

THE COURT FINDS the equitable defense of laches prevents Petitioner/Wife from being able to recover nay arrearage from before December 1, 2011.

The Court using Exhibit C and the testimony from the parties was able to reconstruct what Respondent/Husband owed to Petitioner/Wife from December 1, 2011 to May 30, 2014. From December 1, 2011 to November 30, 2013 Respondent/Husband

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generated three thousand thirty six dollars in arrears ($3,036.00). On December 1, 2013 Respondent/Husband received a cost of living adjustment which made his disability waiver worth two hundred fifty nine dollars ($259.00) (rounding up) a month. Petitioner/Wife was entitled to one hundred twenty nine dollars and fifty cents ($129.50) of this retirement benefit. From December 1, 2013 to May 30, 2014 Respondent/Husband generated an arrearages of seven hundred seventy seven dollars ($777.00).

THE COURT FINDS from December 1, 2011 to May 30, 2014 Respondent/Husband has generated an arrearage of three thousand eight hundred thirteen dollars ($3,813.00).

Respondent/Husband makes two additional request of the Court. First Respondent/Husband asks that the Court use the equitable doctrine of laches to apply no interest to the arrearages and also to allow Respondent/Husband to pay back the arrearages for as long as it was allowed to generate.

It would also be inequitable to allow Respondent/Husband to have three years to pay back the arrearage. Respondent/Husband used misappropriated money to the benefit of himself. Petitioner/Wife has suffered because of her inaction and now needs the money immediately.

Nathan Rothschild
Law Clerk

IT IS ORDERED that there shall be no interest applied on the arrearages for the time in which they accrued.

IT IS ORDERED granting Petitioner/Wife, Sandra K. Howell, a judgment against Respondent/Husband, John Q. Howell, in the amount of THREE THOUSAND EIGHT HUNDRED THIRTEEN dollars ($3,813.00) plus interest at the legal rate for any amount due and owing after June 1, 2014.

IT IS ORDERED that Respondent/Husband is responsible for ensuring Petitioner/Wife receive her full 50% of the military retirement without regard for the disability. Failure to do so shall be punishable by contempt. Contempt may include additional fines, fees, and jail time.

/ss/
HON. DANELLE B. LIWSKI

cc: Hon. Danelle B. Liwski
Barry G. Nelson, Esq.
Sandra K. Howell
Clerk of Court – Under Advisement Clerk

Nathan Rothschild
Law Clerk

Appendix D

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. DANELLE B. LIWSKI CASE NO. D78235

DATE: March 17, 2014

SANDRA K. HOWELL
Petitioner

and

JOHN Q. HOWELL
Respondent

RULING

IN CHAMBERS RE MOTION TO RECONSIDER

The court has received a motion to reconsider its March 10, 2014 ruling. The Court having read the motion and considered the arguments contained therein;

IT IS ORDERED DENYING the motion to reconsider filed on March 14, 2014.

/ss/
HON. DANELLE B. LIWSKI

Nathan Rothschild
Law Clerk

cc: Hon. Danelle B. Liwski
Barry G. Nelson, Esq.
Sandra K. Howell

Nathan Rothschild
Law Clerk

Appendix E

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. DANELLE B. LIWSKI CASE NO. D78235

COURT REPORTER: John Bouley DATE: March 10, 2014
Courtroom – 686

SANDRA K. HOWELL
Petitioner

VS.

JOHN Q. HOWELL
Respondent

RULING

UNDER-ADVISEMENT RULING—FAMILY LAW

On November 6, 2013, Petitioner/Wife filed a motion to enforce the decree. Specifically the motion requested to enforce the military retirement provision of the decree. The Decree of Dissolution provides that Petitioner/Wife receive half of Respondent/Husbands military retirement.

On December 5, 2013, Respondent/Husband filed a motion to dismiss Petitioner/Wife's motion to enforce.

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Law Clerk

Respondent/Husband argues that because the reduction in the payments was due to his military disability under Title 38 of the United States Code chapter 11 (Title 38 Disability) he is not required to pay the difference in benefits and the Court cannot require him to pay or create an offset under A.R.S. §25-318.01.

On January 7, 2013, the parties appeared before the Court. The Court took the matter under advisement and gave leave to Petitioner/Wife to obtain evidence to show the Respondent/Husband disability payments were under a different title. Petitioner/Wife was unable to show Respondent/Husband was receiving anything other than Title 38 Disability.

HISTORY OF THE CASE:

The parties were divorced in 1991. The parties entered into an agreement on April 16, 1991. The agreement provided, "Petitioner is entitled to and is awarded as her sole and separate property FIFTY PERCENT (50%) of Respondent's military retirement when it begins through a direct pay order." This agreement was signed by the court as a Decree of Dissolution of Marriage on April 16,1991. Payment of the military retirement began in 1992.

On January 25, 2005, Respondent husband received a disability evaluation of 20% from the Veteran Administration (VA). This disability evaluation was post dated to June 30, 2004 when Respondent/Husband first petitioned for his disability. Exhibit B. The

disability rating given to Respondent/Husband was done under Title 38 Disability.

The effect of this disability rating was a dollar for dollar reduction of approximately $250 per month of the military retirement pay in favor of disability pay. One effect of this election was a reduction in Petitioner/Wife's share of the retirement pay by approximately $125 per month. Petitioner/Wife was dependent on and expecting this money.

LEGAL ARGUMENTS:

Respondent/Husband through counsel argues that A.R.S. §25-318.01 effectively removes the Courts jurisdiction to divide or consider the Title 38 disability and therefore the claim must be dismissed.

On July 29, 2010, A.RJ. §25-318.01 became effective. A.R.S. §25.318.01 provides:

> In making a disposition of property pursuant to § 25-318 or §25-327, a court shall not do any of the following:
>
> > 1. Consider any federal disability benefits awarded to a veteran for service-connected disabilities pursuant to 38 United States Code chapter 11.
> >
> > 2. Indemnify the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in

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Law Clerk

military retirement or retainer pay related to receipt of the disability benefits.

3. Award any other income or property of the veteran to the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retirement or retainer pay related to receipt of the disability benefits.

The Court disagrees with Respondent/Father. In order for the statute to remove the Court's ability to make a disposition of Title 38 disability the statute must act retroactively to change a vested property right. Based on due process concerns, and the general disfavor of retroactive legislation the statute cannot be read to retroactively effect property settlement agreements.

One of the problems with retroactive legislation affecting property rights is that an individual cannot conduct rational business decisions based on the law if the law is subject to change and divest their property rights. An individual should be able to make an informed decision and not face adverse consequences because of the whim and fancy of the legislature. *See: Landgraf v. USI Film Products*, 511 U.S. 244, 264-265 (1994).

In this case, Petitioner/Wife could not have adequately protected herself against the legislation which effectively divests her proprietary interest in the retirement account.

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Law Clerk

Respondent/Husband through counsel agrees that the date the agreement was signed Petitioner/Wife had a vested interest in fifty percent of the military retirement. *Koelsch v Koelsch.* 148 Ariz, 176, 181, 713 P.2d 1234, 1239 (Holding: when a court divides community property in a decree of dissolution each party receives an immediate vested separate property interest in all the property awarded to them). Respondent/Husband through counsel also stated that under *Gaddis,* Respondent/Husband could not unilaterally divest her interest in the retirement. *In Re Marriage of Gaddis,* 191 Ariz. 467, 469, 957 P.2d 1010, 1012 (1997); *see also Danielson* v. *Evans,* 201 Ariz. 401, 407-08 ¶¶ 19-24, 36 P.3d 749, 755-56 (App. 2001). Respondent/Husband argues that *Gaddis* has been effectively overruled by *Merrill* and A.R.S. 25-318.01. *Merrill* dealt with Title 10 disability, Title 10 disability is not considered by A.R.S. 25-318.01. *Merrill* v. *Merrill,* 230 Ariz. 369, ¶27, 284 P.3d 880, 887 (2012). *Merrill is* easily distinguishable from *Gaddis* for this reason. *Merrill* also voices concern about the constitutional viability of A.R.S. 25-318.01 if it were to be applied to already vested property rights. *Merrill,* 230 Ariz. 369, ¶27 & n.5, 284 P.3d at 887 & n.5. *Merrill* fails to overturn *Gaddis* and in footnote 5 specifically states concerns about applying the decision to vested property rights.

THE COURT FINDS Petitioner/Wife had a vested properly right in 50% of Respondent/Husbands military retirement.

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Law Clerk

THE COURT FINDS Respondent/Husband violated the decree by unilaterally decreasing the retirement pay in favor of disability pay.

Respondent/Husband argues that despite the violation A.R.S, §25-318.01 doesn't allow for the court to redress this violation. A vested property right is defined as, "actually assertable as a legal cause of action or defense or is so substantially relied upon that retroactive divestiture would be manifestly unjust." *Hall v. A.N.R. Freights systems, Inc.*, 149 Ariz. 130, 139, 717 P.2d 434, 443. To protect against this manifest injustice, statutes passed by the state legislature shall not be read to be retroactive unless there is an express statement that the statute shall apply retroactively. A.R.S. §1-244. This rule is compatible with the long held policy against retroactive legislation. *See: Landgraf v. USI Film Products*, 511 U.S. 244, 264-265 (1994).

The Arizona Supreme Court has found as a general principle "legislation may not disturb vested substantive rights by retroactively changing the law that applies to completed events." *San Carlos Apache Tribe v, Superior Court*, 193 Ariz 195, ¶15, 972 P.2d 179, 189 (1999). For the legislature to retroactively change such property rights violates the due process clause contained in, article 2, section 4 of the Arizona constitution. *Id*

If the Court has no ability to redress the damage because of the statute the statute would be in violation of basic concepts of fairness and due process of law.

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Law Clerk

Courts have a duty to interpret statutes in a way that makes them constitutionally sound. *Blake v. Schwartz*, 202 Ariz. 120, ¶27, 42 P.3d 6, 12 (App. 2002) (citations omitted), *quoting Edward J. DeBartolo Corp. v, Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

THE COURT FINDS that A.R.S, §25-318.01 contains no express statement that the statute shall apply retroactively

THE COURT FINDS A,R.S. §25-318.01 cannot be applied retroactively to decree's of dissolution before its passage on July 29, 2010.

THE COURT FINDS A.R.S. §25-318.01 does not apply to vested property rights which vested prior to July 29,2010.

THE COURT ORDERS Respondent/Father's motion to dismiss be denied along with all relief requested therein.

THE COURT FINDS that Respondent/Husband had an obligation to pay Petitioner/Wife 50% of the military retirement as ordered in the decree.

THE COURT FINDS that Respondent/Husband owed Petitioner/Wife 50% of the military retirement regardless of the disability rating as his election unilaterally alters a vested property right

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Law Clerk

THE COURT ORDERS the parties to appear before the court at 4:15 p.m. for half an hour on March 20, 2014 for a status conference to determine discovery needs and set a date for an evidentiary hearing.

/ss/
HON. DANELLE B. LIWSKI

cc: Hon. Danelle B. Liwski
Barry G. Nelson, Esq.
Sandra K. Howell
Clerk of Court – Under Advisement Clerk

Nathan Rothschild
Law Clerk

Appendix F

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

In Re the Marriage of	)	
	)	
SANDRA K. HOWELL,	)	No. D-78235
	)	
Petitioner,	)	
and	)	
	)	DECREE OF
JOHN Q. HOWELL,	)	DISSOLUTION
	)	OF MARRIAGE
Respondent.	)	
	)	

This matter coming on regularly to be heard with the Petitioner appearing in person and through her attorney, KAREN E. ALLEN, and the Respondent appearing in person and through counsel, CONSTANCE H. SACRA, having been regularly served and an Answer being filed within the time allowed by law; and the evidence having been adduced;

THE COURT FINDS AS FOLLOWS:

1. That at the time this action was commenced, the Petitioner was domiciled in the State of Arizona and a resident o the County of Pima, Arizona, and that said domicile had been so maintained for a period in excess

of ninety (90) days immediately prior to the filing of said Petition;

2. That there are two minor children of the parties to this marriage; DEIDRE R. HOWELL, whose date of birth is 9/21/78 and JASON T. HOWELL, whose date of birth is 5/31/82 and the Wife is not now pregnant.

3. That the martial relationship heretofore existing between the parties is irretrievably broken.

4. That the conciliation provisions of A.R.S. Section 25-381.09 either do not apply or have been met.

5. That the Court obtained jurisdiction over both parties by acceptance service on Respondent of the Summons and Petition for Dissolution.

6. That to the extent it has jurisdiction to do so, the Court has herein considered, approved and made provision for the disposition of property and debts.

7. That to the extent it has jurisdiction to do so, the Court has herein considered, approved and made provision for child custody and child support.

WHEREFORE, there being good cause:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the marital relationship heretofore existing between the parties is hereby dissolved and the parties are restored to the status of single persons;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED as follows:

1. The parties will keep the personal property in his or her possession, except that Petitioner will give the Respondent the tape recorder.

2. Petitioner is awarded the 1985 Oldsmobile and Respondent is awarded the 1990 Honda, subject to the lien therefore. Petitioner shall provide evidence to Respondent that the Oldsmobile is registered and insured in her name.

3. Respondent shall pay and hold Petitioner harmless therefrom any community debts which he assumed in February, 1990 for the repair of Petitioner's automobile.

4. The parties shall divide the 1990 income tax refund equally.

5. Petitioner is entitled to and is awarded as her sole and separate property FIFTY PERCENT (50%) of Respondent's military retirement when it begins through a direct pay order.

It is further ORDERED ADJUDGED AND DECREED

1. That the custody of the minor children, DEIDRE RENEE HOWELL and JASON TODD HOWELL is awarded solely in Petitioner with Respondent having supervised visitation, supervision to be provided by a mutally agreed upon family member.

2. Respondent shall provide major medical and dental insurance for the minor children of the parties. The Petitioner shall pay 100% of any uninsured medical and dental expenses.

3. Respondent shall pay child support in the amount of FIVE HUNDRED EIGHTY FIVE DOLLARS ($585.00) per month, calculated as follows: income for Respondent is based upon a monthly gross income of $2,325.80 and a monthly income for Petitioner of $486.00 for disability; basic child support is $644.00 with an additional education expense of $60.00 (tutoring) for a basic figure of $704.00; Respondent's percentage is 83%. Said child support payments shall be made through the Clerk of the Superior Court and a Wage Assignment shall issue. Respondent shall also pay the $13.80 annual handling fee through the Clerk of the Superior Court.

Further, Respondent shall pay child support payments directly to the Clerk of the Superior Court in the amount of $585.00 per month, commencing the first day of the first month following entry of this Decree, until such time as the Wage Assignment is entered.

Further, the parties shall exchange financial information every twelve (12) months to adjust the amount of child support. This information includes, but is not limited to, copies of pay stubs, income tax returns and W-2 forms.

4. The Respondent shall be entitled to claim the children as exemptions for income tax purposes until the Court orders otherwise.

5. Respondent will pay all visitations expenses for himself and the minor children.

IT IS FURTHER ORDERED as follows:

1. Respondent shall pay the balance of $250.00 for Petitioner's attorney's fees as ordered on February 20, 1990 directly to Petitioner's attorney. Otherwise, each party is to be responsible for their own attorney's fees and costs.

2. Respondent shall pay to Petitioner as and for spousal maintenance the amount of $150.00 per month until his retirement begins in October, 1992 unless she remarries before this date.

DONE IN OPEN COURT THIS 16 day of April, 1991.

/ss/

COMMISSIONER OF THE SUPERIOR COURT